

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**TENTATIVE RECOMMENDATION**

## **Effect of Joint Tenancy Title on Community Property**

**January 1993**

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN April 15, 1993.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

## SUMMARY OF TENTATIVE RECOMMENDATION

Historically in California married persons have titled their community property as joint tenancy unaware of the adverse consequences of that form of separate property tenure, including the inability to will it or to obtain community property tax benefits. On the death of a spouse the survivor has had to make a showing that the joint tenancy title was for convenience only and there was no intent to convert the community property to joint interests in separate property. In recent years this informal arrangement has broken down as courts give greater effect to the form of title and the Internal Revenue Service refuses to recognize community property claims for property titled as joint tenancy.

This recommendation is intended to ensure that married persons who take title to property as joint tenants do so knowingly and intentionally. In order to convert community property to separate property held as joint tenants, the spouses must transmute the property by an express written declaration; otherwise it remains community property. The recommendation requires persons who assist spouses in titling their property to inform them of the advantages and disadvantages of community property and joint tenancy. A "safe harbor" statutory form is provided with sufficient information and a proper declaration to enable spouses to transmute community property to separate property held as joint tenants, if desired. The statutory presumption that community property remains community unless transmuted to joint tenancy would apply retroactively to property acquired before the operative date of the statute.

## EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

A husband and wife in California may hold property in joint tenancy or as community property.<sup>1</sup> The two types of tenure, one common law and the other civil law, have different legal incidents — the spouses have different management and control rights and duties, creditors have different rights to reach the property, and the property is treated differently at dissolution of marriage and at death.<sup>2</sup>

In California it is common for husband and wife to take title to property in joint tenancy form even though the property is acquired with community funds. Frequently the joint tenancy title form is selected by the spouses on the advice of a broker or other person who is unaware of the differences in legal treatment between the two types of property tenure. The spouses themselves ordinarily do not know the differences between the two types of tenure, other than that joint tenancy involves a right of survivorship.<sup>3</sup>

As a consequence, a person who is adversely affected by the joint tenancy title form may litigate in an effort to prove that the spouses did not intend to transmute the community property into joint tenancy. Because joint tenancy is often disadvantageous to the spouses (it frequently frustrates the decedent's trust or other estate plan and results in adverse tax consequences if the property has appreciated in value) the courts in the past have been liberal in relaxing evidentiary rules to allow proof either that the spouses did not intend to transmute community property to separate property held as joint tenants or, if they did, that they subsequently transmuted it back.<sup>4</sup>

The result has been general confusion and uncertainty in this area of the law, accompanied by frequent litigation<sup>5</sup> and negative critical comment.<sup>6</sup> It is apparent

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1. Fam. Code § 750. The spouses may also hold property as tenants in common, although this is relatively infrequent.

2. See, e.g., Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L. J. 927 (1983); 10 Comm. Prop. J. 157 (1983).

3. See, e.g., Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L.J. 769, 828-38 (1982).

4. See, e.g., Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143, 159-68 (1981).

5. See, e.g., *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003 (1932); *Delanoy v. Delanoy*, 216 Cal. 23, 13 P.2d 513 (1932); *Tomaier v. Tomaier*, 23 Cal. 2d 754, 146 P.2d 905 (1944). Cases struggling with the issue in the past few years include *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); *Estate of Levine*, 125 Cal. App. 3d 701, 178 Cal. Rptr. 275 (1981); *In re Marriage of Stitt*, 147 Cal. App. 3d 579, 195 Cal. Rptr. 172 (1983); *Estate of Blair*, 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988); *In re Marriage of Hilke*, 14 Cal. Rptr. 2d 371 (1992); *In re Marriage of Allen*, 10 Cal. Rptr. 2d 916 (1992) (rev. granted).

6. See, e.g., Marshall, *Joint Tenancy Taxwise and Otherwise*, 40 Calif. L. Rev. 501 (1952); Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87 (1961); Mills, *Community Joint Tenancy--A Paradoxical Problem in Estate Administration*, 49 Cal. St. B.J. 38 (1974); Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego, L. Rev. 143 (1981); Bruch, *The Definition and Division of Marital Property in California: Toward Parity and Simplicity*, 33 Hastings L.J. 771 (1982); Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927 (1983); 10 Comm. Prop. J. 157 (1983); Kasner, *Community Property in Joint Tenancy Form: Since*

that the interrelation of joint tenancy and community property requires clarification.

Legislation enacted in 1965 directly addressed the problem of married persons taking title to property in joint tenancy form without being aware of the consequences and in fact believing the property is community.<sup>7</sup> Former Civil Code Section 5110 was enacted to provide that a single-family residence acquired during marriage in joint tenancy form is presumed community property for purposes of dissolution of marriage. This presumption had a beneficial effect and was expanded in 1983 to apply to all property acquired during marriage in joint tenancy form.<sup>8</sup> The 1983 legislation also made clear that the community property presumption may be rebutted only by a clear writing by the spouses, but that separate property contributions are reimbursable at dissolution of marriage.<sup>9</sup> This legislation is limited in effect and does not address treatment of the property at death of a spouse,<sup>10</sup> or during marriage before dissolution or death.

Community property provides a married person important protections that separate property held as joint tenants does not. Community property protections include:

- (1) Fiduciary duties in management and control of the property.<sup>11</sup>
- (2) Limitations on depletion of the community by gift.<sup>12</sup>
- (3) Limitations on disposition of the family home or other community real property.<sup>13</sup>
- (4) Prohibition on forced partition of the property during marriage.<sup>14</sup>
- (5) Right to will the decedent's community property interest.<sup>15</sup>
- (6) Passage of property to the surviving spouse absent a will.<sup>16</sup>
- (7) Passage of property to the surviving spouse without probate,<sup>17</sup> and ability of the surviving spouse to elect probate if desired.<sup>18</sup>

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We Have It, Lets Recognize It (1991); Petrusis, *Joint Tenancy: A Mere Form of Title*, 12 Estate Planning, Trust & Probate News, No. 4 at p.8 (State Bar of California 1992).

7. Cal. Assem. Int. Comm. on Judic., Final Report relating to Domestic Relations, reprinted in 2 App. J. Assem., Cal. Leg. Reg. Sess. 123-24 (1965).

8. Civ. Code § 4800.1, enacted by 1983 Cal. Stat. ch. 342, § 1. See California Law Revision Commission — Report Concerning Assembly Bill 26, 1983 Sen. J. 4865 (1983).

9. Civ. Code § 4800.2, enacted by 1983 Cal. Stat. ch. 342, § 2.

10. *In re Marriage of Hilke*, 14 Cal. Rptr. 2d 371 (1992).

11. Fam. Code §§ 721, 1100(e), 1101.

12. Fam. Code § 1100(b).

13. Fam. Code § 1102.

14. Code Civ. Proc. § 872.210(b).

15. Prob. Code § 6101.

16. Prob. Code § 6401.

17. Prob. Code § 13500.

18. Prob. Code § 13502.

(8) Stepped-up income tax basis for appreciated community property share of the surviving spouse.<sup>19</sup>

Joint tenancy provides greater protection than community property from liability for debts of a married person.<sup>20</sup> However, the common law protection is at the expense of a creditor who may be denied payment for a just debt. Moreover, the supposed benefits of protection from creditors are offset by a greater detriment. The law limiting the liability of joint tenancy property may cause a joint tenant to be denied credit, or to be allowed credit only with the other joint tenants and only subject to a security interest in the joint tenancy property. By comparison, the statute governing liability of community property for debts represents sound social policy based on a balanced consideration of all aspects of the debtor-creditor relationship, including the need for fairness to all parties and to encourage extension of credit to married persons.<sup>21</sup>

Other arguments that have been advanced for the desirability of joint tenancy for married persons also are not persuasive.

- Depreciated joint tenancy property retains a higher income tax basis than depreciated community property, but this is relatively unimportant since the vast majority of property in California has appreciated rather than depreciated in value, and community property receives a substantial tax advantage in this situation.

- Joint tenancy property passes automatically to the surviving spouse, but this feature is illusory since either spouse may unilaterally sever the joint tenancy and will the spouse's interest in the property.

- Automatic passage to the surviving spouse may, and frequently does, inadvertently frustrate a well-conceived estate plan that seeks to pass the decedent's share of the property, for example, to a bypass trust or a child of a former marriage.

- The ability to clear title quickly by an affidavit of death is a characteristic of joint tenancy property that applies to community property as well.

The statutory incidents of community property that have been enacted over the years for the protection of married persons correspond with what most married persons want and expect. They are generally advantageous to married persons. Joint tenancy ill-serves the needs of most married persons, despite its wide-spread but uninformed use. For these reasons, the Law Revision Commission believes that the law should ensure that married persons who take title as joint tenants do so knowingly and intentionally.

In order to convert community property to separate property held as joint tenants, the spouses should make an express and knowing transmutation of the

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19. Int. Rev. Code § 1014.

20. See discussion in Sterling, *supra*, 14 Pac. L.J. at 945-51; 10 Comm. Prop. J. at 175-182.

21. California Law Revision Commission, *Recommendation relating to Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1984).

community property to joint tenancy.<sup>22</sup> A person who assists married persons in titling their property should be required to inform them of the advantages and disadvantages of community property and joint tenancy. A "safe harbor" statutory form should be enacted with sufficient information and a proper declaration to enable a person to transmute community property to joint tenancy, if that is what is really desired. Failure to execute the proper declaration of a knowing and intentional transmutation of community property to separate property held as joint tenants should leave the community character of the property unaffected.

The community property presumption should apply retroactively as well as prospectively.<sup>23</sup> This will provide a clear rule for the millions of existing marital property titles now caught in the legal limbo between community property and joint tenancy, and will do it in a way that corresponds with the probable intent of most married persons.<sup>24</sup> It will also correspond with the probable effect of existing statute and case law.<sup>25</sup> However, the duty imposed on brokers and other advisers to inform married persons of the differences between the different tenures should be deferred for one year; this will allow sufficient time for the advisers to become familiar with the new requirements and prepare any necessary forms and documents.<sup>26</sup>

The proposed statutory scheme corresponds with the intention of most married persons not to lose basic community property protections merely by taking property in joint tenancy title form, while enabling those who really want joint tenancy treatment to obtain it. The proposed law will provide certainty and minimize litigation over the issue whether the property should be treated as community property or separate property held as joint tenants.

Treating the property as community at death will enable passage at death to the surviving spouse without probate. Title to the property can be cleared quickly

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22. This is analogous to the "Acceptance of Joint Tenancy" in use in Arizona. The requirement would apply only to community property, not separate property. The law applicable to commingling, tracing, reimbursement, gift, and other principles affecting separate property contributions to community property or joint tenancy would be unaffected. See, e.g., Fam. Code § 2640 (separate property contributions to property acquisition).

23. Retroactivity of a statutory community property presumption for property in joint tenancy form is validated in *Marriage of Hilke*, 14 Cal. Rptr. 2d 371 (1992). The proposed legislation codifies the *Hilke* ruling that a joint tenancy survivorship right is not a vested right before the death of a joint tenant. In any event it is likely that the effect of existing statute and case law is the same as that proposed in this recommendation — community property remains community unless transmuted to separate property joint tenancy. See footnote 25, *infra*.

24. The Law Revision Commission has consulted with a number of estate planning experts active in state and local bar associations. Their experience is that most married persons, when fully informed of the differences in treatment between community property and separate property held as joint tenants, indicate a preference and intent that the property remain community.

25. The requirement in Family Code Section 852 of an express declaration in writing to transmute community property to separate property may negate the effect of many joint tenancy titles and leave unaffected the character of property having a community property source. See discussion in Kasner, *Community Property in Joint Tenancy Form: Since We Have It, Lets Recognize It* (1991); Petrulis, *Joint Tenancy: A Mere Form of Title*, 12 *Estate Planning, Trust & Probate News*, No. 4 at p.8 (State Bar of California 1992).

26. The proposed legislation includes a statutory form that satisfies the advice and declaration requirements and that may be used by any person to obtain true joint tenancy.

and simply either by affidavit<sup>27</sup> or by summary court proceeding.<sup>28</sup> It will also avoid possible frustration of the decedent's estate plan since the community property may be passed by will (for example, to an exemption-equivalent testamentary bypass trust, with resultant tax savings for survivors).

In short, community property tenure is more advantageous to the parties than joint tenancy in the ordinary case, and corresponds to the ordinary expectations of the parties who take title in joint tenancy form. Community property in joint tenancy form should receive community property treatment for all purposes, unless the parties clearly indicate in writing their intent to hold their interests as joint tenants in separate property.

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27. Prob. Code §§ 210-221; see also Prob. Code § 13540 (right of surviving spouse to dispose of real property).

28. Prob. Code §§ 13650-13660.

## RECOMMENDED LEGISLATION

**Note.** These provisions are cast in terms of the Family Code since they would be operative January 1, 1995. The operative date of the Family Code is January 1, 1994.

### **Civ. Code § 683 (amended). Creation of joint interest**

SECTION 1. Section 683 of the Civil Code is amended to read:

683. (a) A joint interest is one owned by two or more persons in equal shares, by a title created by a:

(1) A single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from,

(2) A transfer, when expressly declared in the transfer to be a joint tenancy:

(A) From a sole owner to himself or herself and others, ~~or from,~~

(B) From tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, ~~or from,~~

(C) From a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, ~~when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.~~

(b) A joint tenancy in personal property may be created by a written transfer, instrument, or agreement.

~~(b) Provisions of this section do~~

(c) This section is subject to Chapter 6 (commencing with Section 860) of Part 2 of Division 4 of the Family Code (effect of joint tenancy title on community property).

(d) This section does not apply to a joint account in a financial institution if Part 2 (commencing with Section 5100) of Division 5 of the Probate Code applies to such account.

**Comment.** Section 683 is amended to recognize enactment of Family Code Sections 860-867, governing the effect of joint tenancy title on real and personal community property.

The reference in the section to a grant or devise to executors or trustees as joint tenants is deleted. Rights and duties among joint executors and cotrustees are governed by statute and not by the law of joint tenancy. See Prob. Code §§ 9630-31 (joint personal representatives) and 15620-22 (cotrustees).

The other changes in the section are technical, for organizational purposes.

### **Fam. Code §§ 860-867 (added). Effect of joint tenancy title on community property**

SEC. 2. Chapter 6 (commencing with Section 860) is added to Part 2 of Division 4 of the Family Code, to read:



## CHAPTER 6. EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

### § 860. Scope of chapter

860. (a) This chapter applies to real and personal property held between married persons in joint tenancy form to the extent the property has a community property source. Property has a community property source if it is acquired in whole or part with community property or if the form of title is the result of an agreement, transfer, exchange, express declaration, or other instrument or transaction that affects community property.

(b) Nothing in this chapter affects the law applicable to commingling, tracing, reimbursement, gift, or other principles affecting separate property contributions to community property or separate property held in joint tenancy form.

**Comment.** Sections 860 to 867 govern the effect of joint tenancy title on community property. A husband and wife may hold property as joint tenants (or tenants in common) or as community property. Section 750. Joint tenancy (or tenancy in common) is a form of separate property ownership and is inconsistent with community property. See, e.g., *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003 (1932). See, generally, discussion in *Sterling, Joint Tenancy and Community Property in California*, 14 Pac. L. J. 927 (1983), 10 Comm. Prop. J. 157 (1983).

Section 860 limits this chapter to property held in joint tenancy form that has a community property source. Thus treatment of separate property contributions to community property or separate property held in joint tenancy form is governed by law other than this chapter. See, e.g., Section 2640 (separate property contributions to property acquisition).

This chapter applies to personal property as well as real property. See subdivision (a); see also Section 760 (community property).

### § 861. Community property presumption notwithstanding joint tenancy title

861. Property of married persons that has a community property source is presumed to remain community property even though the property is held by the married persons in joint tenancy form. The presumption established by this section is a presumption affecting the burden of proof.

**Comment.** Section 861 resolves the conflict in the case law between the presumption that property acquired by the spouses during marriage is community property and the presumption that joint tenancy title means what it says. Under Section 861, when these two presumptions conflict, the community property presumption prevails. The community property presumption may be overridden by proof of a transmutation of the property to separate property held as joint tenants. See Section 862.

Under this section, community property that is not properly transmuted to separate property held as joint tenants remains community property for all purposes and receives community property treatment at death, including tax and creditor treatment and passage without probate (unless probate is elected by the surviving spouse). Prob. Code § 13500. In the case of community real property that passes without probate, the surviving spouse has full power to deal with and dispose of the property after 40 days from the death of the spouse, and title to the property may be established by affidavit. Prob. Code § 13540.

### § 862. Transmutation of community property to joint tenancy

862. (a) The presumption established by Section 861 may be rebutted only by proof of an instrument that satisfies Chapter 5 (commencing with Section 850)

(transmutation of property). The instrument may be a part of a document of title or may be a separate instrument, and may be executed together with a document of title or at another time.

(b) Use of the form provided in Section 864 satisfies this section.

**Comment.** Section 862 makes clear that the transmutation statute governs creation of joint tenancy from community property. The spouses may transmute community property to separate property held as joint tenants by agreement or transfer. Section 850. A transmutation of real or personal property is not valid unless done in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected. Section 852(a). A transmutation of real property is not effective as to third parties without notice of it unless recorded. Section 852(b).

An express declaration transmuting community property to separate property held as joint tenants should state that the property is "converted from community property to joint interests in separate property", or words to that effect expressly stating that the characterization or ownership of the property is being changed. See *Estate of MacDonald*, 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911 (1990). The express declaration requirement may be satisfied by use of the statutory form provided in Section 864.

#### **§ 863. Information concerning form of title**

863. (a) Any person who provides a form or other instrument for use by a married person, or who advises a married person, to hold property in joint tenancy form shall inform the married person concerning the advantages and disadvantages of community property and separate property held as joint tenants. The information shall compare legal incidents of the two forms of tenure, including management and control, rights of creditors, intestate succession, testamentary disposition, applicability of probate, and income tax consequences at death.

(b) Use of the form provided in Section 864 satisfies this section.

(c) Failure to provide information that satisfies this section does not affect the validity of a transmutation of community property to separate property held as joint tenants that is otherwise valid.

**Comment.** Section 863 requires that a person who offers married persons the option of holding property in joint tenancy form must provide information comparing community property and separate property held as joint tenants. A person who fails properly to inform the married persons may be liable for any adverse consequences that result from the joint tenancy form of title. The information requirement of this section may be satisfied by use of the statutory form provided in Section 864. This section applies only to a form or instrument provided or advice given on or after January 1, 1996. Section 867 (transitional provision).

#### **§ 864. Statutory form**

864. (a) An instrument transmuting community property to separate property held as joint tenants satisfies Sections 862 and 863 if the instrument is made in writing by an express declaration substantially in the following form and signed by each spouse:

## DECLARATION OF JOINT TENANCY

### NOTICE

IF YOU SIGN THIS DECLARATION, YOU WILL LOSE IMPORTANT COMMUNITY PROPERTY RIGHTS. DO NOT SIGN THIS DECLARATION UNLESS YOU ARE WILLING TO GIVE UP YOUR COMMUNITY PROPERTY RIGHTS.

SOME OF YOUR COMMUNITY PROPERTY RIGHTS ARE SUMMARIZED BELOW. THIS SUMMARY IS NOT A COMPLETE STATEMENT OF THE LAW. YOU MAY WISH TO SEEK EXPERT ADVICE BEFORE SIGNING THIS DECLARATION.

- **Management and Control.** You and your spouse must act together to transfer any interest in community real property. If you sign this declaration, your spouse acting alone may transfer a one-half interest in the property.

- **Rights of Creditors.** All of your community property is liable for your debts. If you sign this declaration, only your one-half interest in the property is liable for your debts, and when you die your spouse takes your interest free of debts. By signing this declaration you may impair your ability to get credit.

- **Passage to Surviving Spouse.** When you die, your one-half interest in community property passes to the beneficiaries named in your will, for example a child or a trust; if you have no will, it passes to your spouse. If you sign this declaration your one-half interest in the property passes to your spouse; you cannot will your interest in the property to anyone else.

- **Probate.** If you leave your interest in community property to your spouse, your spouse may choose whether or not to probate it; if your spouse elects not to probate it, your spouse may establish title within 40 days after your death by recording an affidavit of your death. If you sign this declaration your spouse must take the property without probate; title may be established immediately by recorded affidavit.

- **Income Taxes.** When your spouse dies you will receive an income tax benefit for community property that has increased in value. If you sign this declaration, you will not receive an income tax benefit for the property unless it has declined in value.

### DESCRIPTION OF PROPERTY

The property that is the subject of this declaration is:

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Description of Property or Document of Title or  
Other Instrument Creating Joint Tenancy Title

## DECLARATION

We have read the Notice in this instrument and understand that we lose important community property rights by signing this instrument. We declare that we intend to convert any community property interest we may have in the property that is the subject of this declaration to joint interests in separate property, and to hold the property for all purposes as joint tenants and not as community property.

\_\_\_\_\_  
Signature of Spouse

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Spouse

\_\_\_\_\_  
Date

## ACKNOWLEDGMENT

State of California       )  
County of \_\_\_\_\_ )

On \_\_\_\_\_ before me, (here insert name and title of officer), personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

(b) Nothing in this section limits or affects either of the following:

(1) The validity of an instrument not substantially in the form provided in this section if the instrument otherwise satisfies Section 862.

(2) The sufficiency of information concerning the advantages and disadvantages of community property and separate property held as joint tenants if the information otherwise satisfies Section 863.

**Comment.** Section 864 provides a "safe harbor" for the requirements of Sections 862 (transmutation of community property to joint tenancy) and 863 (information concerning form of title). This section does not provide the exclusive means by which those sections may be satisfied; any instrument or information that meets the standards in those sections will satisfy them. However, use of the statutory form provided in Section 864 satisfies those sections as a matter of law.

The express declaration provision of this section is consistent with requirements in Civil Code Section 683 ("express declaration" required for joint interest) and in Family Code Section 852 ("express declaration" required for transmutation).

**§ 865. Effect of transmutation to joint tenancy**

865. Transmutation of community property to separate property held as joint tenants changes the character of the interests of the spouses in the property for all purposes from community interests to joint interests in separate property. A severance of the joint tenancy results in a tenancy in common of separate property interests of the spouses and not community property.

**Comment.** Section 865 makes clear that a transmutation of community property to joint tenancy results in a "true" separate property joint tenancy and not a hybrid form of tenure. Married persons may hold property as either community property, joint tenants, or tenants in common. Section 750 (methods of holding property); see also Comment to Section 861 (community property presumption notwithstanding joint tenancy title).

At dissolution of marriage the property is treated as separate property and not as community property. See Section 2581 (presumption concerning property held in joint form). However, the property is subject to the court's jurisdiction at dissolution. Section 2650 (jointly held separate property).

**§ 866. Effect on special statutes**

866. Nothing in this chapter affects any other statute that prescribes the manner or effect of a transfer, inter vivos or at death, of property registered, licensed, or otherwise documented or titled in joint tenancy form pursuant to that statute.

**Comment.** Section 866 saves existing schemes governing transfer of title, probate and nonprobate, applicable to specified types of property. See, e.g., Vehicle Code §§ 4150.5, 5600.5 (coownership vehicle registration); Health & Safety Code § 18080 (coownership manufactured home, mobilehome, commercial coach, truck camper, or floating home registration). Cf. Civ. Code § 683 (creation of joint interest); Fam. Code § 2581 (community property presumption for property held in joint form); Prob. Code § 5305 (presumption that funds on deposit are community property).

**§ 867. Transitional provision**

867. (a) As used in this section, "operative date" means January 1, 1995.

(b) Subject to the provisions of this section, this chapter applies to property held between married persons in joint tenancy form as the result of an instrument executed or transaction that occurs before, on, or after the operative date to the extent provided in Section 4 (transitional provision).

(c) This chapter does not apply to property held between married persons in joint tenancy form if either spouse dies before the operative date.

(d) Section 863 does not apply to a form or other instrument provided for use by a married person or advice given to a married person before January 1, 1996, regardless of when the instrument is executed or the transaction occurs.

**Comment.** Section 867 provides special transitional provisions for this chapter. For general transitional provisions applicable to this chapter, see Section 4.

Under subdivision (b), the community property presumption and transmutation requirement of this chapter apply to property acquired before the operative date, even though

the determination of the character of the property is made after the operative date. Retroactive application of this chapter is necessary to resolve the confusion in the law governing the effect of joint tenancy title on community property. See California Law Revision Comm'n, *Effect of Joint Tenancy Title on Community Property* (Tentative Recommendation, January 1993).

Retroactive application of this chapter does not impair any vested survivorship right of a spouse claiming a joint tenancy interest, since a survivorship right is not a vested interest in property. See discussion in *In re Marriage of Hilke*, 14 Cal. Rptr. 2d 371 (1992). Subdivision (c) recognizes that a survivorship right may be vested at the operative date of this chapter if a married person has died before the operative date. However, the resolution provided by this chapter — that the property remains community unless converted to joint tenancy by a written transmutation — is the probable result under existing statutes and case law in any event. See, e.g., Sections 760 (community property) and 852 (form of transmutation).

**Fam. Code § 2581 (amended). Community property presumption for property held in joint form**

SEC. 3. Section 2581 of the Family Code, as added by 1993 Cal. Stat. ch.\_\_\_\_, § \_\_\_\_ is amended to read:

2581. (a) For the purpose of division of property upon dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, tenancy by the entirety, or as community property is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

~~(a)(1)~~ A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

~~(b)(2)~~ Proof that the parties have made a written agreement that the property is separate property.

(b) Notwithstanding any other provision of this section, property acquired by the parties during marriage in joint tenancy form that has a community property source is governed by Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (effect of joint tenancy title on community property).

**Comment.** Section 2581 is amended to recognize enactment of Sections 860-867, governing the effect of joint tenancy title on community property. Under those provisions, community property in joint tenancy form remains community property absent an effective transmutation. Section 861 (community property presumption notwithstanding joint tenancy title). Once transmuted, the property is separate for all purposes, but is subject to jurisdiction of the court at dissolution, as are all other forms of jointly held marital property. Section 2650 (jointly held separate property).

**Prob. Code § 5305 (amended). Presumption that funds on deposit are community property**

SEC. 4. Section 5305 of the Probate Code is amended to read:

5305. (a) Notwithstanding Sections 5301 to 5303, inclusive, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property.

(b) Notwithstanding Sections 2580 2581 and 2640 of, and Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (effect of joint tenancy title on community property) of, the Family Code, the presumption established by this section is a presumption affecting the burden of proof and may be rebutted by proof of either of the following:

(1) The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married persons made a written agreement that expressed their clear intent that such sums be their community property.

(2) The married persons made a written agreement, separate from the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

(c) Except as provided in Section 5307, a right of survivorship arising from the express terms of the account or under Section 5302, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, may not be changed by will.

(d) Except as provided in subdivisions (b) and (c), a multiple-party account created with community property funds does not in any way alter community property rights.

**Comment.** Section 5305 is amended to make clear that the special transmutation provisions of Family Code Sections 860-867 for the effect of joint tenancy title on community property are not applicable to community property in a multiple-party account. Property rights in such an account are governed by the special provisions of the California Multiple-Party Accounts Law and not by the general Family Code transmutation rules.